

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Mark Acton, Vice Chairman;
Dan G. Blair;
Tony L. Hammond; and
Nanci E. Langley

Rogers Avenue Station
Fort Smith, Arkansas

Docket No. A2011-13

PUBLIC REPRESENTATIVE'S REPLY BRIEF

June 3, 2011

I. INTRODUCTION AND BACKGROUND

On March 29, 2011, the Commission docketed a petition to review the closing of the postal station located at 3400 Rogers Avenue, Fort Smith, AR (Rogers Ave Station).¹ The Petition requests that the Commission review the Postal Service's decision to close the Rogers Ave Station.

The Commission established this docket, appointed a Public Representative, and created a procedural schedule (including deadlines for the Postal Service filing of the

¹ Petition for Review Received from Kelly A. Procter-Pierce Regarding the Closure of the Fort Smith, AR Post Office 72913, March 29, 2011 (Petition).

administrative record for parties to intervene, file statements or briefs), and for the timely consideration and disposition of the issues raised in the Petition.²

In lieu of filing an administrative record, the Postal Service filed a notice that included the “final determination” to close the station on April 12, 2011.³

Two participants filed statements regarding the closure of the Rogers Ave Station: Robert Canaday⁴ and Kelly Procter-Pierce⁵. Participant Juanita Clark filed a Notice of Intervention in which she describes her interest in the proceeding.⁶ The Postal Service filed comments on May 23, 2011 in lieu of a brief.⁷

II. STATEMENT OF FACTS

The three participants are served by the Rogers Ave Station. Procter-Pierce Statement at 2, Clark Notice at 1, Canaday Statement at 1. The participants allege that in closing the Rogers Ave Station, the Postal Service is creating a hardship for them in terms of time and resources by forcing them to travel to inconvenient locations that are more difficult to access in order to obtain service. Procter-Pierce Statement at 2, Clark Notice at 2, Canaday Statement at 1-2.

The Postal Service contends that two other retail facilities exist within 2.5 miles of the Rogers Ave Station, and several other expanded access options exist within two miles. Postal Service Notice at 2-3.

The Postal Service claims that the City of Fort Smith, Arkansas is comprised of approximately 54,000 citizens. *Id.* at Exhibit 1, page 3. The Postal Service contends that there “has been minimal growth in the area in recent years.” *Id.*

² See Notice and Order Accepting Appeal and Establishing Procedural Schedule, April 5, 2011 (Order No. 709).

³ Notice of United States Postal Service, April 12, 2011 (Postal Service Notice).

⁴ Participant Statement from Robert Canaday, May 2, 2011 (Canaday Statement).

⁵ Participant Statement from Kelly Procter-Pierce, May 2, 2011 (Procter-Pierce Statement).

⁶ Request for Waiver and Notice of Intervention, April 28, 2011 (Clark Notice).

⁷ Comments of United States Postal Service, May 23, 2011 (Postal Service Comments).

Participant Canaday rebuts the Postal Service's claim, stating that the most recent census shows the population of Fort Smith to be 86,209 (and the previous census shows a population of 80,286). Canaday Statement at 2.

The Postal Service contends that it will achieve total annual savings of \$96,386 due to the closure of the Rogers Ave Station. *Id.* at Exhibit 1, page 4. That savings, however, includes the salaries of clerks that will be transferred to another station. Canaday Statement at 2.

The Postal Service distributed questionnaires to customers notifying them of the possible discontinuance of the Rogers Ave Station. Postal Service Notice at 3. Those questionnaires were delivered to delivery customers and distributed over the counter to retail customers in November of 2009. *Id.* at Exhibit 1, page 1. The Postal Service notes that of the 386 questionnaires returned, 2 were favorable, 303 were unfavorable and 81 expressed no opinion on the proposed alternate service. *Id.*

The Postal Service states that the retail transactions at the Rogers Ave Station have declined by 7.4 percent from 2008. *Id.* at Exhibit 1, page 1.

The final determination to close the Rogers Ave Station was announced on February 1, 2011. *Id.* at 4. The Postal Service concluded that closing the Rogers Ave Station "will provide a maximum degree of effective and regular postal services to the community." *Id.* at Exhibit 1, page 3.

III. STATION/BRANCH/POST OFFICE JURISDICTION CONFLICT

The Postal Service Notice raised the tired argument that a "postal station" is not a "post office" within the meaning of title 39, and therefore not subject to the requirements or the protections of title 39 (and the regulations of 39 CFR) applicable to discontinuance of post offices. The Postal Service continues to suffer from the delusion that it has the ability to administratively define the Commission's jurisdiction to hear post office closing appeals by its labeling a facility a "station" or a "branch" rather than a post

office.⁸ See e.g., Docket No. A2011-1, Notice of United States Postal Service, November 5, 2010. The Postal Service nevertheless argues that for the closing of the Rogers Ave Station it satisfies the 39 U.S.C. 404(d) requirements, including notice, an opportunity to comment before the determination to close the facility was made, consideration of effect on postal services, the community, employees, and economic savings. Postal Service Notice at 3-4.

The Postal Service frequently contends that the Congress used the words “post office” in a technical sense, with the intent to exclude stations and branches in defining the Commission’s jurisdiction under 39 U.S.C. § 404(d). See e.g., Docket No. A2011-4, Comments of United States Postal Service, January 18, 2011.

The Commission, however, has advised the Postal Service to create uniform procedures for the closing or consolidating of all types of retail facilities. Docket No. N2009-1, Advisory Opinion Concerning the Process for Evaluating Closing Stations and Branches, March 3, 2010 at 61.⁹

The Commission has not adequately addressed the controversy in any recent post office closing appeal, and has in effect dodged the issue, allowing the controversy to continue. See e.g., Docket No. A2011-4, Order Affirming Postal Service Determination, March 16, 2011. A clear statement of the bounds of the Commission’s jurisdiction would be beneficial to provide certainty for the sake of parties that rely on the process. If necessary, the controversy over the breadth of jurisdiction should be

⁸ The Postal Service has also attempted to administratively circumvent or define Commission jurisdiction by labeling the *de facto* closing of a station, branch, or post office a “suspension” that lasts indefinitely and has the same force and effect as a closure. See e.g., Docket No. A2009-1, United States Postal Service Motion to Dismiss Proceeding, July 15, 2009. The Commission rejected the use of the emergency suspension process to create a *de facto* closing in Order No. 319, and should reject the Postal Service’s attempt to define jurisdiction through the internal definition of “station” or “branch.” See Docket No. A2009-1, Order on Appeal of Hacker Valley, West Virginia Post Office Closing, October 19, 2009.

⁹ See also, Comments of the United States Postal Regulatory Commission on Proposed Amendments to Post Office Consolidation and Closing Process, May 2, 2011 *available at* http://www.prc.gov/prc-docs/home/whatsnew/P%20O%20Closing%20Regs%20Comments%20050211_1783.pdf

judicially litigated to have a reliable interpretation of the scope of 39 U.S.C. § 404(d). Such an adjudication would allow the Commission, Postal Service, and participants in closing appeals to allocate their scarce resources towards productive resolution of how to best allocate and protect the universal service attribute of ready access to postal services.

IV. STANDARD OF REVIEW AND APPLICABLE LAW

A. Standard of Review

The Commission does not substitute its judgment for that of the Postal Service in considering an appeal of a closing under 39 U.S.C. § 404(d). Rather, the Commission reviews the Postal Service's determination and may find: (A) that the Postal Service's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (B) without observance of procedure required by law; or (C) unsupported by substantial evidence in the record. Alternatively, the Commission "may affirm the determination of the Postal Service..." See 39 U.S.C. § 404(d)(5).

The remedies available to the Commission, should it determine that the Postal Service's determination is legally flawed, are limited. The Commission may remand the determination for further consideration and suspend the effectiveness of the determination until final disposition of the appeal, but the Commission may not modify the determination of the Postal Service.

B. Applicable Law

The Postal Service, under 39 U.S.C. § 404 shall consider, prior to making a final determination to close or consolidate a post office: (i) the effect of the closing on the community served; (ii) the effect on the employees of the Postal Service employed at the office; (iii) whether the closing is consistent with the Postal Service's provision of "a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining;" (iv) the economic savings to

the Postal Service due to the closing; and (v) such other factors as the Postal Service determines are necessary. See 39 U.S.C. § 404(d)(2)(A)

The Postal Service's final determination must be in writing, address the aforementioned considerations, and be made available to persons served by the post office. 39 U.S.C. § 404(d)(3).

The Postal Service shall take no action to close a post office until 60 days after the final determination is made available. 39 U.S.C. § 404(d)(4).

V. DEFICIENCIES IN POSTAL SERVICE'S FINAL DETERMINATION

The Public Representative asks that the Commission remand the final determination of the Postal Service for further consideration and reconciliation with the conflicting evidence presented in this proceeding.

The general public has an overriding interest that the Postal Service, in making determinations, follow the law, its regulations, and do so in an impartial and transparent manner. On these facts, the Postal Service has provided *prima facie* evidence that it has followed the law in all but the notice requirement, but it has not done so in an impartial or transparent manner. The Postal Service has based its final determination on questionable facts and analysis, and did not remedy or attempt to reconcile its determination in the face of conflicting evidence. The areas where the Postal Service did not adequately follow the statute are discussed below.

A. Notice Procedures Not Properly Followed

The first notice requirement is 39 U.S.C. § 404(d)(1), and that section requires the Postal Service to provide 60 days notice, prior to the proposed date of closing or consolidation, of its intention to close or consolidate a post office, so that interested persons will have an opportunity to present their views.

The Postal Service complied with this requirement by distributing questionnaires in November of 2009.

There is a second notice requirement in 39 U.S.C. § 404(d)(4) that requires that the Postal Service take no action to close a post office until 60 days after the final determination to close that office is made available to the community served by the office.

Here, the Postal Service announced the closing via a press release dated February 1, 2011.¹⁰ The press release announced the closing date as March 26, 2011. There are only 53 days between February 1, and March 26, 2011, a technical violation of the notice requirement of § 404(d)(4).

The Public Representative does not contend that this technical violation, in and of itself, is enough to justify remand of the Postal Service's final determination. However, the Public Representative asks that the Commission remind the Postal Service that the statute requires that the Postal Service make its final determination available to the community served by the post office, and further that it allow for 60 days, after the date the determination is made available, before taking action to close the office. It is incumbent on the Postal Service to provide the community with a minimum amount of notice, as described in § 404(d)(4), to ensure that they have an opportunity to take their concerns to the Commission before the post office is actually closed.

B. Effect on the Community Based on Mischaracterized or Incorrect Facts

The Postal Service's final determination states that the City of Fort Smith, Arkansas, is "comprised of approximately 54,000 citizens." Postal Service Notice at Exhibit 1, page 3. The Postal Service also states that "[b]ased on information the Postal Service obtained...there has been minimal growth in the area in recent years." *Id.*

A participant provided evidence that the Postal Service's population estimate, and categorization of population growth are blatantly misstated. See Canaday

¹⁰ The Public Representative must presume that the Final Determination was made available on February 1, 2011. There is no evidence in the record to determine when the Final Determination was made available to the community served by the Rogers Ave Station.

Statement at 2. The actual population of Fort Smith, according to the 2010 census, is 86,209.¹¹ In 2000 the population of Fort Smith was 80,268.¹² The percentage change in the population from 2000 to 2010 was 7.4 percent.¹³ The last time the Fort Smith area had a population remotely close to the Postal Service's estimate was between 1950 and 1960.¹⁴

These material misrepresentations about the characteristics of the community the Postal Service purports to be evaluating call into question the veracity of the Postal Service's final determination.

The conclusion the Postal Service draws in the final determination that may well be valid – that there exist sufficient access alternatives to provide the community with maximum effective service – however the Postal Service must base this conclusion on accurate facts developed and reported in the record. In this case, the Postal Service's failure to elicit the most basic of facts about the community it purports to be examining for purposes of determining the effect of the closure of the Rogers Ave Station, require that the determination be remanded to ensure the factual accuracy of the final determination.

C. Economic Savings Overstated

The Postal Service reports that it will have a total annual savings of \$96,386 as a result of closing the Rogers Ave Station. Postal Service Notice at Exhibit 1, page 4. The Postal Service contends that there will also be a one time expense of \$272,520 to break the lease and modify the building. *Id.* At the same time, however, the Postal

¹¹ <http://2010.census.gov/news/releases/operations/cb11-cn22.html> (Accessed June 2, 2011).

¹² <http://quickfacts.census.gov/qfd/states/05/0524550.html> (Accessed June 2, 2011)

¹³ $(86,209 - 80,268) \div (80,268)$.

¹⁴ <http://www.census.gov/prod/www/abs/decennial/1960.html> (Accessed June 2, 2011) and <http://www.census.gov/prod/www/abs/decennial/1950.html> (Accessed June 2, 2011).

Service contends that the clerks at the Rogers Ave Station will be transferred to another station. Therefore, the actual savings the Postal Service realizes are only \$39,765.¹⁵

Assuming no inflation, it would take the Postal Service almost seven years to break even on this transaction. Given the amount of time for the Postal Service to recoup its up front fixed costs, based on the actual savings that accrue to the Postal Service, it should consider whether it makes economic sense to complete the lease and opt not to renew, rather than paying to break the lease.

The Public Representative urges the Commission to instruct the Postal Service to report actual economic savings that accrue from closing a facility, rather than micro-accounting for a particular station and claiming that employee costs shifted to other facilities are “savings.”

¹⁵ \$96,386 – \$42,413 (clerk savings) – \$14,208 (clerk benefits). Using the Postal Service’s accounting method for calculating savings accruing from closing a post office, the Postal Service could have saved approximately \$285,255,110 in the first third of the year in 2011 by closing all postal facilities at L’Enfant Plaza and relocating those employees to another facility. See National Payroll Hours PP09 FY2011, Headquarters Consolidated, filed May 26, 2011, *available at*: <http://www.prc.gov/Docs/73/73089/National%20Payroll%20Hours%20PP09%20FY2011.pdf>.

VI. CONCLUSION

Based on a review of the final determination and filings by the Postal Service and other participants, the final determination appears to have significant inaccuracies. The Public Representative asks that the Commission remand the final determination of the Postal Service for further consideration and reconciliation with the conflicting evidence presented in this proceeding.

Respectfully Submitted,

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